No. 87-1262

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

JACK R. ROGERS, GEORGE MICHLIK and D & R WELDING SUPPLY COMPANY, an Illinois Corporation, and RAYMOND E. BRIDGES and BRIDGES WELDING SUPPLY & THERAPY, INC.,

Petitioners,

v.

LIQUID AIR CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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PARTIES

The caption of the case in this Court contains the names of all parties. Excluding wholly-owned subsidiaries, the following are subsidiaries of respondent Liquid Air Corporation: Kent Oxygen Company, Inc.; National Compressed Gases, Inc.; Nuclear Cryogenics, Inc.; Southland Welding Supply, Inc.; Argonal Inc.; Hydrogenal Inc.; Hydrogenal II Inc.; Miller Welders Canada Ltd.; Canadian Helium Ltd; Oxygene St.-Maurice (1983) Ltee.; and 118639 Canada Inc. The following are affiliates of respondent Liquid Air Corporation: Temple Welding Supply & Equipment Inc.; Oxychem U.S.A.; U.S. Divers Corp.; Lipha Chemicals Inc.; Lipha Pharmaceuticals Inc.; Dey Laboratories Inc.; Oxychem Canada Inc.; Lincoln Big Three, Inc.; and Big Three Lincoln U.K.

TABLE OF CONTENTS

	Page
Parties	i
Table of Authorities	iii
Statement of the Case	1
1. The Facts	1
The Relationship of the Parties	1
D & R's "Returns" and the Scheme's Inception	2
How the Scheme Worked	3
Uncovering the Scheme	4
Proof of the Fraud	5
2. Proceedings Below	7
Argument	8
I. The Seventh Circuit Correctly Held That Petitioners' Conduct Constituted a Pattern of Racketeering Activity as Defined Under RICO	8
II. Petitioners' Other Arguments Do Not Present Issues Worthy of Review by This Court	10
Conclusion	12

TABLE OF AUTHORITIES

Cases: *Page*

Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1986) 11

Armco Industrial Credit Corp. v. SLT Warehouse Co., 782 F.2d 475 (5th Cir. 1986) 10

Berkey Photo, Inc. v. Eastman Kodak Co., 457 F. Supp. 404 (S.D.N.Y. 1978), *revs'd in part on other grounds*, 603 F.2d 263 (2d Cir. 1979) 11

Cullen v. Margiotta, 811 F.2d 698 (2d Cir. 1987), *cert. denied*, 107 S.Ct. 3266 (1987) 10

H.J. Inc. v. Northwestern Bell Telephone Co., 829 F.2d 648 (8th Cir. 1987) 10

Herman & MacLean v. Huddleston, 459 U.S. 375 (1983) 10

Morgan v. Bank of Waukegan, 804 F.2d 970 (7th Cir. 1986) 8-9

Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479 (1985) 8, 11

Superior Oil Co. v. Fulmer, 785 F.2d 252 (8th Cir. 1986) 9-10

United States v. Local 560 of the Int'l Brotherhood of Teamsters, 780 F.2d 267 (3d Cir. 1985) 10

Wilcox v. First Interstate Bank of Oregon, 815 F.2d 522 (9th Cir. 1987) 10

Statutes:

18 U.S.C. § 1961(5) 8

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STATEMENT OF THE CASE

1. The Facts

The Relationship of the Parties

Respondent Liquid Air Corporation ("Liquid Air") produces and distributes industrial gas and industrial

gas products. These products are supplied to customers by distributors who lease cylinders from Liquid Air. Distributors pick up full cylinders of industrial gas from their designated Liquid Air distribution center and return empty cylinders there. Pet. App. 2a.[1]

Petitioner D & R Welding Supply Co., Inc. ("D & R"), was a Liquid Air distributor for over 30 years. D & R, which is operated by its principal shareholders, petitioners Jack R. Rogers ("Rogers") and George Michlik ("Michlik"), has branches in Decatur, Streater, and Urbana, Illinois and is engaged in interstate commerce. Pet. App. 2a.

In August 1980 D & R notified Liquid Air that it wished to terminate its distributorship effective in September 1981. Under its Distributor Cylinder Lease Agreement with Liquid Air, upon termination D & R was required to return all leased cylinders to Liquid Air, pay rent on all cylinders until they were returned or accounted for, and pay Liquid Air the replacement value for cylinders not returned or accounted for. The rental price in effect at the time D & R terminated its contract was $2.25 per cylinder per month and the average replacement value per cylinder was $150. When it terminated the agreement, D & R had over 5,000 cylinders outstanding on its lease. Pet. App. 2a.

D & R's "Returns" and the Scheme's Inception

Although D & R was to begin returning cylinders to Liquid Air in September 1981, it did not begin making significant cylinder returns until April 1982 – and then only after Lauren "Bud" Sage ("Sage), Liquid Air's Midwest Regional Manager of Sales and Distribution, requested that D & R do so. Returns were steady for a while, but then began to taper off in the fall of 1982. By August 1982,

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[1] The Appellate Court's opinion is reproduced in the Appendix to the Petition for Writ of Certiorari, and shall be cited herein by appendix page as, *e.g.*, "Pet. App. 10a-11a." The Petition for Writ of Certiorari shall be cited herein by page as *e.g.*, "Pet. 4."

D & R had returned only 1,570 cylinders. To expedite the sluggish returns, Liquid Air increased the cylinder rental rate it was charging D & R for outstanding cylinders. Pet. App. 2a.

The rent increase in the fall of 1982 created a business problem for Rogers, Michlik and D & R, since it put pressure on D & R to reduce its lease balance quickly. D & R solved this problem with the aid of Liquid Air employee Raymond E. Bridges ("Bridges"), then Distribution Supervisor for the Peoria Distribution Center. As distribution supervisor, Bridges was responsible for the total operation of the Peoria facility. Rather than return the remaining cylinders owed, D & R would have Bridges falsify Liquid Air records. Bridges was able to execute the scheme because he had complete control of the paperwork at the Peoria Distribution Center. Pet. App. 2a-3a.

How the Scheme Worked

In early November 1982, the plan in place, D & R stopped returning cylinders. Instead, Rogers and Michlik supplied Bridges with phony quantities of supposedly "returned" cylinders. Bridges entered these numbers on Liquid Air shipping orders, signed for Liquid Air, got a D & R signature or signed for D & R himself, and then mailed the shipping orders to Liquid Air's administrative office in Willowbrook, Illinois, for processing. Willowbrook personnel entered the return information shown on the falsified shipping orders at Liquid Air's remote terminal there. The information was then transmitted by telephone line to Liquid Air's mainframe computer in California. D & R's monthly lease statements showing a reduced cylinder balance were issued in California and mailed to D & R from there. On paper, D & R was relieved of the financial obligation to account for or pay rental on those cylinders. Pet. App. 2a-3a, 11a.

Thus, the actual reductions in D & R's lease statements were made thousands of miles from Peoria,

solely on the basis of falsified figures shown on the D & R shipping orders which Bridges prepared. Each false return resulted in two uses of the mails and one use of the wires. Each time a false shipping order was submitted, Liquid Air was deprived of rent and replacement value on the cylinders. This process was repeated nineteen separate times over seven months.[2] Through Bridges' falsifications, D & R was able to reduce its lease balance to almost zero by June 1983. Pet. App. 3a, 11a.

In return for Bridges' falsification of shipping orders to show D & R cylinder returns that were never made, Rogers and Michlik agreed to set him up in his own welding business in Peoria. They would supply personnel, capital and welding products. By setting up Bridges in business, Rogers and Michlik were able to expand their business into Peoria. They were prevented from doing so directly by a noncompetition agreement with a Peoria welding supply company, A.W. Moore Welding. Rogers and Michlik could thus circumvent the noncompetition agreement with Moore Welding while simultaneously eliminating their cylinder return problem and saving themselves hundreds of thousands of dollars in additional cylinder rental and replacement costs. Pet. App. 3a.

Uncovering the Scheme

On August 3 and 4, 1983, Sage visited the Peoria Distribution Center. Sage became suspicious after another Liquid Air employee reported seeing Bridges removing cylinders from the Peoria Distribution Center. Bridges' claimed to have permission from Sage to do so, but Sage had given Bridges no such permission. Sage began to

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[2] Petitioners attempt to relitigate the settled facts and mislead this Court by stating that there were sixteen falsified shipping orders. Pet. 4-5. The Appellate Court found, as Liquid Air proved to the jury, that there were nineteen separate falsified returns. Pet. App. 10a-11a.

question the cylinder supply in Peoria, and realized that had D & R actually made its returns he should have seen many thousands more cylinders piled up in Peoria than he did. Sage returned to the regional office and enlisted Gil McCaw ("McCaw"), Liquid Air's Administration Manager, to determine whether cylinders were missing from Peoria. Pet. App. 3a.

McCaw projected the number of cylinders that should have been in Peoria at that time, assuming that D & R had returned all of the cylinders it claimed to have returned. McCaw then compared this projected inventory to the actual physical inventory taken in Peoria for July 1983, and discovered that, on paper, D & R appeared to have returned many more cylinders to Peoria than actually were there. McCaw confirmed this analysis by conducting a physical inventory of the cylinders in Peoria. McCaw's analysis showed that 3,307 cylinders were missing. The difference between the number of cylinders that should have been in Peoria in July 1983 and the number actually there (3,307) is almost exactly the same as the number of cylinders allegedly returned by D & R during the period when the scheme operated, *i.e.*, from November 1982 to June 1983. Pet. App. 3a.

McCaw's analysis also revealed that just before the falsified returns began, Bridges stopped completing the required monthly inventories of cylinders located at the Peoria Distribution Center. Bridges thus eliminated the only means by which Liquid Air personnel outside of Peoria could know how many cylinders were actually present in Peoria. Inventory was not taken again until July 1983, immediately after Bridges left Liquid Air to go into the business set up by Rogers and Michlik.

Proof of the Fraud

Notwithstanding D & R's claim throughout the litigation that it had returned all but 12 cylinders to Liquid Air by June 1, 1983, over a year after the suit was

filed, D & R's dockman revealed during his deposition that D & R at that time had 220 Liquid Air cylinders in its possession. At trial, the dockman testified that the number had grown to 290. Only after the trial did D & R disclose that it actually had 530 Liquid Air cylinders in its possession – cylinders which it ultimately returned to Liquid Air to reduce the judgment. Pet. App. 22a, 32a-33a.

Liquid Air also discovered numerous irregularities in the falsified returns and in petitioners' explanation of how those "returns" were made. All of the falsified shipping orders were signed by Rogers and Michlik, and their assistant Oliver Pennypacker, while those few legitimate returns were filled out by D & R's regular drivers. Notwithstanding Rogers, Michlik and Pennypacker's claims to have returned cylinders, none of Liquid Air's employees had seen them at the Peoria Distribution Center. Even D & R employees testified that they had not seen Rogers, Michlik or Pennypacker drive a truck during the relevant period. Pet. App. 12a.

In answer to this, petitioners claimed that they returned cylinders at times when there were no Liquid Air employees around other than Bridges. This was contradicted by Liquid Air employee time records, which showed that Liquid Air's dockmen were routinely working on the dates reflected on the falsified shipping orders. Petitioners could offer no explanation for this inconsistency. Indeed, at trial petitioners could not even agree on who was responsible for counting the cylinders reflected on the falsified shipping orders. Pet. App. 12a-13a.

Notwithstanding defendants' persistent denial of D & R's involvement with Bridges Welding, the evidence to the contrary included the following: Jack Rogers had asked his former business partner to go into business in Bridges Welding with him; Bridges Welding was incorporated and held its first organizational meeting while Bridges was still a Liquid Air employee; D & R supplied

personnel and over $100,000 in welding supplies to Bridges Welding without charge; Michlik cosigned a loan thus enabling his nephew to buy stock in Bridges Welding; Bridges Welding leased all its cylinders from Rogers' son Butch, who purchased them through D & R. Pet. App. 16a.

As a direct result of Bridges Welding's presence in Peoria, Moore Welding lost customers. Moore Welding was thus injured when D & R set Bridges up in business to circumvent its noncompetition agreement. Pet. App. 11a.

2. Proceedings Below

This cause was tried to a jury in Peoria over two and one half weeks in July 1987. The jury found against all petitioners on all of the counts under the Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. §§ 1961-1968, and on the conversion count. In addition, the jury returned a verdict against Bridges for breach of fiduciary duty, and against the D & R defendants (D & R, Rogers and Michlik) for inducement to breach of fiduciary duty.[3] Pet. App. 4a.

The jury awarded Liquid Air actual damages of $750,000 (before trebling) on each RICO count and on the count for inducement to breach of fiduciary duty. On the conversion count, the jury awarded actual damages of $350,000 and punitive damages of $25,000 against D & R; $15,000 against Bridges Welding; $10,000 each against Rogers and Michlik, and $5,000 against Bridges. In addition, the jury assessed actual damages of $4,000 and punitive damages of $1,000 against Bridges for breach of fiduciary duty. Pet. App. 4a. Liquid Air's recovery was limited to the greatest single recovery under any one count. Pet. App. 4a n. 1.

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[3] The jury returned verdicts for Bridges on two counts concerning misappropriation of miscellaneous property and welding supplies unrelated to the 3,307 cylinders.

Petitioners raised 30 separate issues on appeal. All were rejected by a unanimous panel of the Seventh Circuit, which affirmed the judgment below in an opinion written by Chief Judge Bauer. Pet. App. 1a-23a. Petitioners' motion for reconsideration or hearing *en banc* was denied. Pet. App. 26a-27a.

ARGUMENT

I. The Seventh Circuit Correctly Held That Petitioners' Conduct Constituted a Pattern of Racketeering Activity as Defined Under RICO.

The RICO Act defines a pattern of racketeering activity as at least two acts of racketeering activity committed within a ten-year period. 18 U.S.C. § 1961(5). In *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479 (1985), this Court commented that a pattern requires continuity plus relationship among those predicate acts. *Id.* at 496 n. 14.

Consistent with RICO and *Sedima*, the Seventh Circuit has adopted a fact-based test for deciding whether a plaintiff has demonstrated the existence of a pattern of racketeering activity. Under this test, in determining whether the acts are sufficiently continuous and related to form a pattern, a court must examine the following factors: the number and variety of predicate acts and the length of time over which they were committed, the number of victims, the presence of separate schemes and the occurrence of distinct injuries. *Morgan v. Bank of Waukegan*, 804 F. 2d 970, 975 (7th Cir. 1986).

Applying that test here, the Seventh Circuit correctly found that petitioners had engaged in a pattern of racketeering activity. As the Court noted, petitioners defrauded Liquid Air through the execution of nineteen separate fraudulent shipping orders falsely reflecting the return of cylinders that, in fact, were never returned. Pet. App. 11a. Each fraudulent return resulted in two acts of mail fraud and one act of wire fraud. Each fraudulent return

resulted in a separate and distinct injury to Liquid Air, and a benefit to D & R. Petitioners could have terminated their scheme at any time. Instead, week after week, for seven months, they renewed their efforts to defraud Liquid Air. The Seventh Circuit held that such "repeated infliction of economic injury upon a single victim of a single scheme is sufficient to establish a pattern of racketeering activity for purposes of civil RICO." Pet. App. 11a.

Contrary to petitioners' assertion (Pet. 13-15), the Seventh Circuit's opinion here does not conflict with its earlier opinion in *Morgan*. The Court's conclusion here that there was repeated infliction of economic injury is merely the result of applying the factual criteria first identified in *Morgan*. As the Court stated in the instant case, "Morgan envisioned a fact-specific inquiry, in which no single factor would be determinative." Pet. App. 11a. The Seventh Circuit saw no inconsistency here, and Petitioners mislead this Court by suggesting that any exists.

Similarly, there is no clear conflict between the Seventh Circuit's holding in the instant case and that of the Eighth Circuit in *Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir. 1986). In *Superior Oil*, the Eighth Circuit, like the Seventh after it, stressed that a pattern of racketeering activity required "continuity plus relationship." *Id.* at 257. Although the precise nature of the predicate acts is not disclosed, the opinion in *Superior Oil* suggests that the Eighth Circuit could not find continuity in defendant's scheme to convert natural gas from plaintiff. *Id.* at 257. The Court stated that multiple schemes were required, but made clear that the determination of pattern would be intensely factual. Both circuits agree that such continuity must exist for a pattern of racketeering activity to be found. Thus, in the instant case, the Eighth Circuit's stated requirement of multiple schemes could have been satisfied by the repeated infliction of economic injury to Liquid Air that the Seventh Circuit found, or by the separate but additional injury to Moore Welding in Peoria, that resulted from the scheme.

Even assuming, *arguendo*, that the Eighth Circuit's holding in *Superior Oil* concerning RICO's pattern requirement conflicts with that of other circuits, certiorari should still be denied here. There is evidence that the Eighth Circuit's position is still evolving. In separate concurrences to an opinion issued in late 1987, two Eighth Circuit judges expressly requested that the Circuit reevaluate its ruling in *Superior Oil*, stating that the "multiple scheme requirement that we have grafted onto the pattern element strays from the statutory language of RICO." *H.J. Inc. v. Northwestern Bell Telephone Co.*, 829 F. 2d 648, 650-651 (8th Cir. 1987) Accordingly, there is no reason for the Court to review the correct decision of the Seventh Circuit.

II. Petitioners' Other Arguments Do Not Present Issues Worthy of Review by This Court.

Petitioners' other arguments for review are frivolous. Every court that has decided the question of the standard of proof under RICO has applied the preponderance of the evidence standard. *Wilcox v. First Interstate Bank of Oregon*, 815 F. 2d 522, 531 (9th Cir. 1987); *Cullen v. Margiotta*, 811 F. 2d 698, 731 (2d Cir. 1987), *cert. denied*, 107 S.Ct. 3266 (1987); *Armco Industrial Credit Corp. v. SLT Warehouse Co.*, 782 F. 2d 475, 480-481 (5th Cir. 1986); *United States v. Local 560 of the Int'l Brotherhood of Teamsters*, 780 F. 2d 267, 279 n.12 (3d Cir. 1985). As the Seventh Circuit held, this result is consistent with the holding in *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983), where this Court approved a preponderance standard in securities fraud actions. Pet. App. 7a-8a.

Neither law nor logic supports petitioners' argument that criminal procedural protections should apply in civil RICO actions between private litigants. This argument relies on petitioners' characterization of the statute as quasi-criminal. Pet. 16. Petitioner cites no case involving a private civil damages action in which this Court, or any court, has accorded a defendant the procedural protections

he would receive in a criminal prosecution by the government. The Seventh Circuit summarily dismissed this argument. Pet. App. 7a n. 2.

Petitioners' argument that treble damages constitute an excessive fine under the Eighth Amendment is equally baseless. As the Seventh Circuit noted, this argument has been flatly rejected in antitrust cases by lower courts. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 457 F. Supp. 404 (S.D.N.Y. 1978), *revs'd in part on other grounds*, 603 F. 2d 263 (2d Cir. 1979). Moreover, petitioners' reliance for this argument on *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986) is misguided. There, this Court in dicta addressed solely the issue of punitive damages, which, unlike statutory treble damages, are subject to complete jury discretion and are not necessarily tied to any measure of actual damages.

Finally, petitioners' arguments concerning both the measure of damages and the imposition of vicarious liability under RICO present questions intimately tied to the particular facts of this case, not recurring questions of law that have application in other cases or that require resolution or even comment by this Court. In affirming the damages awards here, the Appellate Court found, consistent with *Sedima*, 473 U.S. at 497, that the measure of damages under civil RICO is the harm occasioned as a result of the predicate acts. Pet. App. 21a. Here, Liquid Air's damages were equal to what it was entitled to receive under its contract, *i.e.*, the replacement value of the cylinders plus lost rent. In concluding that Bridges Welding was vicariously liable, the Seventh Circuit merely applied textbook corporation law to the plain language of RICO.

CONCLUSION

In sum, petitioners have presented no valid reason for this Court to review the Seventh Circuit's unanimous affirmance of the jury's verdicts for plaintiff Liquid Air. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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